United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1157

To be argued by
DAVID J. GOTTLIEB

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

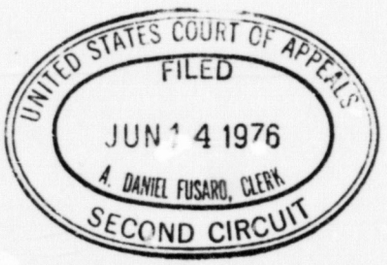
WILLIAM H. JACKSON,

Defendant-Appellant.

Docket No. 76-1157

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether appellant, convicted of a petty offense with a maximum penalty of six months' imprisonment, can be sentended under 18 U.S.C. §4208 to a study, since that section can be employed only where the maximum penalty is in excess of one year's imprisonment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable John R. Bartels, District Judge) entered on March 12, 1976, convicting appellant William H. Jackson of a single count of obstruction of the mails, in violation of 18 U.S.C. §1701, and sentencing him to the custody of the Attorney General pursuant to 18 U.S.C. §4208(b) for the purpose of a study and to enable the Court to receive a report and thereafter to take action permitted under 18 U.S.C. §4208(b).

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

In a superseding information filed on November 18, 1975, appellant Jackson was charged with two counts of obstruction of the mails, in violation of 18 U.S.C. §1701.[1] On the date of trial, the Government moved to dismiss one count of the

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[1]The information is B to the separate appendix to appellant's brief.

information, since "retention of the count might have required a jury trial" (7[2]). The Government's motion was granted, the count was dismissed, and a non-jury trial commenced before Judge Bartels.

A. The Trial Evidence[3]

The principal Government witness was one James Brown, a 75-year old friend of appellant's and his family and a former resident in their home. In 1971 Brown moved in with appellant as his boarder, first at appellant's apartment and later at a home purchased by appellant on Staten Island. Brown's income consisted of welfare checks delivered first at appellant's post office box and later directly to appellant's house. Brown cashed the checks by having appellant accompany him to the Staten Island Check Cashing Corporation.

In September 1972 Brown suffered a heart attack and was hospitalized in Harlem Hospital. While he was convalescing, appellant purchased and delivered a television set to Brown (76, 133). He also took Brown his welfare checks, which

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[2]Numerals in parentheses refer to pages of the transcript of trial, held on December 2, 1975.

[3]Unless otherwise indicated by citation to the trial record, the facts summarized herein are drawn from the findings of fact in the opinion of the District Court filed December 12, 1975, included as C to the separate appendix to appellant's brief.

Brown would endorse a i appellant would then cash, returning the proceeds to Brown. Eventually appellant obtained a letter signed by Brown and the welfare office authorizing appellant to endorse and cash the checks.

In December 1972 Brown returned to the Jackson home. Brown testified that after he returned he orally revoked appellant's authority to cash his checks. Appellant remembered no such revocation (see 125, 130-131, 133-144).

In March 1973 Brown disappeared without warning from the Jackson house, leaving all his personal belongings and no forwarding address. Appellant's family tried unsuccessfully to locate Brown on several occasions (96-98, 157).

Nine months after his disappearance, several Government checks addressed to Brown were received at appellant's house. Appellant testified that after receiving each check he waited to see if Brown would return to claim them. When Brown did not appear, appellant, believing he was still authorized to cash the checks, signed his name and Brown's to the checks and gave the money to his wife, who deposited the proceeds in her bank account (125, 130, 133-134, 142, 162-163). Appellant testified that he was holding the money as security for the rent Brown owed and for the television set he had purchased for Brown (133-134, 148-149, 158).

On December 12, 1975, in a written opinion, the District Court found appellant guilty of obstruction of the mails. The Court concluded that Brown had revoked appellant Jackson's

authority to cash the checks, that appellant knew he had no authority to cash the checks, and that by cashing the checks and spending the money for his own use, appellant knowingly and willfully obstructed the mails.

B. The Sentence Hearing

Appellant appeared for sentencing on March 12, 1976. In mitigation of sentence, defense counsel stated that appellant, who admitted cashing the checks charged in the information, was under the impression that he had authority to do so. Defense counsel also noted that, although she had had no trouble discussing matters with appellant during trial, the probation report indicated that appellant had an "extensive mental history" and had been "institutionalized on several occasions" (Sentencing Minutes at 5).

Counsel urged that, in light of the Probation Department's finding that appellant "has problems remembering things, [and] that he is confused," the Court consider appellant's difficulty with his memory as evidence that he honestly believed he had authority to cash the checks (see Sentencing Minutes at 4-5).

The following then occurred:

> THE COURT: Well, I'll tell you what I'm going to do: I'm going to send him away for a study.
>
> [DEFENSE COUNSEL]: Well, Your Honor, in view of the fact that the maximum sentence

that can be imposed in this sentence [sic] is a six-months sentence --

THE COURT: Yes.

[DEFENSE COUNSEL]: -- I wonder if that is the best thing to do.

THE COURT: Yes, it is. We have had a conference on this also, as you perhaps know, with the other judges and probation officers.

Do you have anything more to say, Ms. Seltzer?

[DEFENSE COUNSEL]: No, Your Honor.

The Court then pronounced sentence, committing appellant to the custody of the Attorney General for a study pursuant to 18 U.S.C. §4208(b). Bail was continued pending the outcome of this appeal.

ARGUMENT

APPELLANT, CONVICTED OF A PETTY OFFENSE WITH A MAXIMUM PENALTY OF SIX MONTHS' IMPRISONMENT, CAN NOT BE SENTENCED TO A STUDY UNDER 18 U.S.C. §4208, SINCE THAT SECTION CAN BE EMPLOYED ONLY WHERE THE MAXIMUM PENALTY IS IN EXCESS OF ONE YEAR'S IMPRISONMENT.

In this case, the maximum sentence which could have been imposed upon appellant for conviction of a petty offense was six months' imprisonment. Despite this fact, and defense protestation that a sentence to a study of up to six months might not be "advisable," the District Court committed appellant to a study under §4208(b). The sentence was more than inadvisable, it was unauthorized and illegal. Accordingly, the judgment must be vacated for re-sentence.

Section 4208 begins with a directive relating to its applicability:

> Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that a defendant be sentenced to a term of imprisonment exceeding one year, ...
>
> 18 U.S.C. §4208(a).

The statute requires that the imposition of a sentence of more than one year is a basic precondition for the avail-

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[4] 18 U.S.C. §4208 is set out in full as D in the separate appendix to appellant's brief.

ability of sentencing under §4208. Further, it is clear from a reading of the statute as a whole that the one-year sentence requirement is not limited to §4208(a), but is applicable to all sentences imposed under §4208.

Thus, §4208(b), the precise subsection under which appellant was sentenced, provides that if the court desires more detailed information as a basis for determing a sentence, it may commit the defendant to the custody of the Attorney General, which commitment shall be deemed for the maximum period of imprisonment prescribed by law, "for a study as described in subsection (c)."

Subsection (c) of the statute in turn provides for a diagnostic study "[u]pon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a)." And, as we have noted, subsection (a) has as its precondition a sentence in excess of one year's imprisonment. Thus, the simple reading as a whole of the portions of §4208, as the section itself recognizes, makes it abundantly clear that the study provisions of §4208(b) are operable only where the court has initially imposed a sentence in excess of one year. Since the maximum sentence appellant could receive is six months' imprisonment, he could not have been sentenced under this provision.

Appellant's position is supported by both the legislative history of §4208 and elementary common sense.

Section 4208 was passed as part of P.L. 85-752, an act designed "to provide Federal judges with additional information, services and sentencing procedures which will enable them to impose upon convicted Federal offenders sentences that are equitable, flexible and sufficiently long to fulfill more fully the function of protecting public safety." H.R. Rep. No. 1946, 85th Cong., 2d Sess. (1958), at 3 (emphasis added). The principal problem in sentencing which occasioned Congressional concern about the need for new sentencing procedures was the existence of gross disparities in sentencing, which "casts doubt upon the evenhandedness of justice and discourages a respect for the law." S. Rep. No. 2013, 1958 U.S. Code Cong. & Admin. News, 85th Cong., 2d Sess., at 3893.

To combat these disparities, Congress authorized the establishment of institutes and joint councils on sentencing. Another section included in the law was §4208. Like the institute on sentencing, the principal purpose of §4208 was to encourage rehabilitation and protect society by reducing sentence disparities: "[T]he most practicable method for smoothing out such disparities lies in a sentencing system which permits the courts to share with the executive branch the responsibility for determining how long a prisoner should serve before he can safely be released." S. Rep. No. 2013, 1958 U.S. Code Cong. & Admin. News, 85th Cong., 2d Sess., at 3893.

Thus, subsection (a) of §4208 empowers the court with the discretion either to fix a parole eligibility date at the time sentence is imposed or to designate the Parole Board to do the same. In either case, a study under §4208(c) is made. Subsection (b) evolved from Congressional recognition that in particularly complex cases the sentencing judge would need detailed information on the prisoner's criminal and social background before selecting any of these alternatives. Thus, subsection (b) permits a §4208(c) diagnostic study while tentatively imposing the maximum period of imprisonment. Clearly subsection (b) was enacted to complement subsection (a), was passed together with subsection (a), and must be read with that subsection.

As the "one-year" limitation of §4208(a) makes clear the vital purposes of §4208 are not seriously implicated where the maximum sentence is not more than one year's imprisonment. While Congress was primarily concerned with reducing disparities in sentencing, any disparities in sentences with a one year maximum will be minimal. Moreover, the statute provides for studies which may take as long as six months to complete.[5] Very little benefit can be gained by causing a defendant to undergo a study necessitating six months' in-

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[5] The experience of the Legal Aid Society, Federal Defender Services Unit, is that §4208 sentences are frequently extended to six months.

contention that the language of §4208(a) referring to

carceration for a crime punishable by no more than a year's imprisonment.

Indeed, the employment of a §4208(b) study in this case would lead to an absolutely absurd result. If, as is permissable, the length of the study here is extended up to six months, appellant will have served his entire sentence by the time the District Court is able to act upon the study. The study will thus be meaningless, and the resources expended for the study will have served no purpose whatsoever. Congress should not be held to have authorized a procedure which wastes Federal resources and is at odds with common sense. Sutherland, STATUTES AND STATUTORY CONSTRUCTION, §45.12 (Sands Rev. 4th ed. 1973).

We recognize that one case construing this aspect of §4208(b) has held, in a divided opinion, that the section may be employed by the district judge in cases where the maximum possible sentence is no greather than one year's imprisonment. United States v. Lancer, 508 F.2d 719, 727-728 (3d Cir. en banc), cert. denied, 421 U.S. 989 (1975).

The majority's conclusion that §4208(b) could be applied to minor crimes was based upon its observation that there is no express "one-year" limitation in subsection (b), and that the purpose of (b) -- to help the court with complex cases -- can be served in cases where the maximum sentence is less than one year. We respectfully submit, as did the Government in Lancer when it conceded that §4208(b) did not apply to sen-

cated factors, which a study by the Bureau of

tences of one year or less, that the majority's conclusions are incorrect.

First, the majority in Lancer erred by examining subsection 4208(b) -- both textually and with respect to its purpose -- entirely apart from the rest of the statute. Yet, as noted above, both the statute and the legislative history make clear that §4208 is a unified provision with complimentary purposes. If the statute is properly construed, with "each part or section ... construed in connection with every other part or section to produce a harmonious whole," the one-year limitation must be read into §4208(b). See Sutherland, STATUTES AND STATUTORY CONSTRUCTION, supra, §46.05; see generally Richards v. United States, 369 U.S. 1, 11 (1962); State Highway Commission of Missouri v. Volpe, 479 F.2d 1099, 1111-1112 (8th Cir. 1973).

Moreover, the majority's conclusion that a §4208(b) study is permissible in minor cases because complicated factors are just as likely in such cases as in cases with greater than one year's imprisonment ignores the fact that these "complicated factors" are just as likely to be present in a case where the court orders a study under §4208(a) (United States v. Lancer, supra, 508 F.2d at 741 (Forman, J., dissenting)) , and there is no doubt that §4208(a) is not available for a sentence of not more than one year's imprisonment. As already noted, the reason for this limitation is not the presence or absence of complicated issues in sentencing, but the fact that there is little

chance for gross sentence disparity in minor crimes and little practical purpose to be served by having a defendant undergo a study which can last nearly as long as his maximum sentence.

In sum, it is plain from the express words of the statute, its legislative history, and common sense that the study provisions of §4208(b) can be utilized only for defendants who have committed serious crimes carrying sentences of more than one year's imprisonment. Since the District Court's sentence here under this provision was illegal, a remand for resentencing is required.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be vacated and the case remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

_____, 19__

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

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